86-994

FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALKBROADWAY REALTY, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

HERBERT S. KASSNER*
STACY J. HAIGNEY
KASSNER & HAIGNEY
122 East 42nd Street
New York, New York 10168
(212) 557-3755

Attorneys for Appellant
Walkbroadway Realty, Inc.

*Counsel of Record

December 15, 1986

QUESTIONS PRESENTED

1. Does a municipal Zoning Ordinance which retroactively requires a property owner to pay Eight Hundred Fifty Thousand ($850,000.00) Dollars in "conversion contributions" violate the Due Process Clause of the Fourteenth Amendment where such property owner's activities for which such "contributions" were required substantially initiated under a valid permit and pursuant to existing law prior to the adoption of such Zoning Ordinance?

2. Does a property owner acquire "vested rights" protectible by the Due Process Clause of the Fourteenth Amendment where such owner makes substantial expenditures and takes substantial action to further a legitimate business purpose under a valid permit and pursuant to existing law, notwithstanding the subsequent passage of a Zoning Ordinance which purported to require enormous payments by the owner to carry out such purposes and which resulted in the revocation of its lawfully granted permit?

3. Does a Zoning Ordinance create irrational classifications violative of the Equal Protection Clause of the Fourteenth Amendment where, *inter alia*, exemption from the contribution payments required by the Ordinance were granted to persons who had taken no steps other than filing for a building permit by a certain date but denied to persons who applied after such date and, upon issuance of their permits, expended substantial effort and expense in reliance upon such permit?

TABLE OF CONTENTS

		PAGE
QUESTIONS PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF AUTHORITIES		iv
OPINION BELOW		1
JURISDICTION		1
STATUTE AND ORDINANCE INVOLVED		2
STATEMENT		4
THE QUESTION IS SUBSTANTIAL		7
I. The Revocation Of Appellant's Building Permit And The Assessment Of Oppressive Conversion Contributions As A Condition To Obtaining A New Permit Violates The Due Process Clause		8
II. The Assessment Of "Conversion Contributions" Against Appellant And Persons Similarly Situated Irrationally Discriminated Against Appellant vis-a-vis Other Property Owners In Violation Of the Equal Protection Clause		10
CONCLUSION		13
APPENDIX A	Final Determination of Appellate Division	1a
APPENDIX B	Final Opinion of Justice Ascione	3a
APPENDIX C	Order and Judgment of Justice Ascione	13a

		PAGE
APPENDIX D	Judgment of Justice Ascione.....	18a
APPENDIX E	Final Order and Judgment of New York Court of Appeals.....	21a
APPENDIX F	Notice of Appeal to the United States Supreme Court	22a
APPENDIX G	Affidavit of Chow	23a

TABLE OF AUTHORITIES

CASES PAGE

Ettor v. Tacoma, 228 U.S. 148 (1913) 8

LeFrak Forest Hills Corp. v. Galvin, 338 N.Y.S. 2d 932 (2d Dept. 1972), *aff'd mem.*, 32 N.Y. 2d 796, *cert. den.*, 414 U.S. 1004 (1973) 9

People v. Miller, 304 N.Y. 105 (1952) 9

Southern Cooperative Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), *cert. den.*, 103 S.Ct. 3539 (1984) 8-9

Vance v. Bradley, 440 U.S. 93 (1979) 10

CONSTITUTIONAL AMENDMENTS

Fourteenth Amendment of the Constitution of the United States ..... *passim*

ORDINANCES

Article 1, Chapter 5 of the New York City Zoning Resolution (as amended April 9, 1981) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ____

WALKBROADWAY REALTY, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of the State of New York, which was affirmed without opinion by the Appellate Division and for which leave to appeal was denied and an appeal as of right dismissed by the New York Court of Appeals without opinion, appears in the Appendix hereto, along with the memorandum decisions of the appellate courts.

JURISDICTION

The final decision and judgment of the Court of Appeals was entered on September 16, 1986, and this Jurisdictional

Statement was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(2).

STATUTE AND ORDINANCE INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Chapter 5 of the New York City Zoning Resolution (as amended April 9, 1981), provides, in pertinent part:

> 15-50 *RELOCATION OF INCENTIVE PROGRAM*
>
> 15-51
>
> Preamble
>
> In order to reduce the deleterious effects on commercial and manufacturing uses caused by the reduction of existing floor area available to such uses as the result of the conversion of nonresidential buildings to dwelling units or joint living-work quarters for artists, while permitting owners to convert such buildings to dwelling units or joint living-work quarters for artists, thereby increasing the value of such buildings, a Relocation Incentive Program is established.
>
> * * *
>
> Under the Relocation Incentive Program, owners who plan to convert space used for commercial and manufacturing uses to dwelling units or joint living-work quarters for artists under the provisions of this chapter . . . will be required to pay a conversion contribution or provide

direct relocation payments before they can obtain an Alteration Permit.

Building owners may receive a discount from the conversion contribution if they provide direct assistance to manufacturing tenants which re-locate in New York City.

Prior to the issuance of an Alteration Permit for the development of dwelling units or joint living-work quarters for artists, an owner must present proof of either payment of the conversion contribution or BSA approval of direct relocation payments.

15-532

Contribution Procedure

Prior to the issuance of an Alteration Permit, the owner shall pay the conversion contribution in an amount equal to the rate applicable at the date of payment multiplied by the gross floor area as provided in Section 15-531.

15-54

Direct Help

The Board of Standards and Appeals shall issue an authorization for a discount from all or part of the amount of the conversion contribution when it determines that the owner of an applicable building has made a direct help payment in accordance with Section 15-541 through Section 15-546.

15-541

Amount of Direct Help Payment

The direct help payment shall be equal to 50% of the conversion contribution. To entitle the owner of an applicable building to be eligible for the discount authorized under the provisions of Section 15-54, such owner shall make direct help payments in accordance with the following:

15-013

Building Permits Issued Before the Effective Date of This Chapter

At the option of the owner, the provisions of this chapter shall not apply to any alteration for which:

(a) plans were filed and pending with the Department of Buildings on September 1, 1980, and a Building Permit was issued by (the effective date of this amendment), or

(b) a variance was granted by the Board of Standards and Appeals prior to (the effective date of this amendment).

STATEMENT

On September 30, 1980, appellant Walkbroadway Realty, Inc. ("Walkbroadway")[1] purchased a building in lower Manhattan at a price of $1,927,500.00 for the purpose of converting it from commercial to residential use. (Appendix ["A"] at 23a-24a).[2]

At the time of the purchase, and indeed at all times relevant hereto, residential housing was a permitted use under the Zoning Resolution of the City of New York ("Zoning Resolution"). To effectuate its renovation program, Walkbroadway expended over $80,000.00 in legal fees to obtain the necessary building permits and to secure the eviction of holdover commercial tenants (A. 24a). The building permit was applied for on December 8, 1980 and granted on March 6, 1981 (A. 4a). As respondent the City of New York ("City") has never disputed, upon the grant of the building permit, there was no legal impediment to Walkbroadway's immediate commence-

---

1 Appellant has no parent, affiliate or subsidiary corporation.

2 The Appendix hereto consists of relevant portions of the record on appeal to the Appellate Division, together with all judicial determinations under review.

ment of work to affect the conversion of the building into residential housing. Accordingly, Walkbroadway promptly entered into a contract with a general contractor obligating it to pay a minimum of $2,400,000.00 for a portion of the basic improvements (A. 24a). Immediately on receipt of approval, the interior of the building was demolished and a heating system which cost $63,850.00 was installed (A. 24a). The general contractor was initially paid approximately $150,000.00 for its preliminary work and $35,000.00 and $10,000.00 were paid for architectural and engineering fees respectively (A. 24a).

Despite such substantial expenditures made in reliance upon existing law and a valid permit, the City, through its Department of Buildings, purported to revoke Walkbroadway's building permit by a letter dated July 30, 1981 (A. 4a, 23a). The City's purported basis for revoking the permit was that one month *after* Walkbroadway's permit was issued, the Zoning Resolution was amended to require a so-called "conversion contribution" under the Amendment. (The text of relevant portions of the Amendment or "Relocation Incentive Program" is set out at p. 2 *et seq.*, *supra*.)

According to the Amendment, its purpose was purportedly to "reduce the deleterious effects on commercial and manufacturing uses caused by . . . the conversion of non-residential buildings to dwelling units . . ." (p. 2, *supra*.) The "contribution" Walkbroadway was ultimately forced to pay into escrow as a condition to revalidating its building permit was the staggering sum of $848,240.00 (or $9.00 per square foot) (A 5a). (The escrow payments were without prejudice to Walkbroadway's right to seek review as to the validity and applicability of the Amendment (A. 4a).)

Walkbroadway challenged, *inter alia*, the constitutionality of the Zoning Amendment in a declaratory action and special proceeding against the City in New York Supreme Court, the court *nisi prius* in that State (A. 3a *et seq.*). In essence, Walkbroadway contended, as it does here, that the revocation of its permit and the retroactive imposition of nearly

$850,000.00 in "conversion contributions" violated the Due Process and the Equal Protection Clause of the Fourteenth Amendment.

On July 30, 1985, Justice Ascione, sitting in Special Term, Part I of the Supreme Court for New York County, ruled, in the only written opinion by the New York judiciary in this case, that the retroactive amendment applied to Walkbroadway and transgressed none of its constitutional rights (A. 3a *et seq.*). Predictably, the Appellate Division for the First Department affirmed without opinion and the New York Court of Appeals denied, without opinion, leave to appeal and dismissed Walkbroadway's appeal as of right (A. 1a-2a, 21a).

As shown below, the revocation of Walkbroadway's permit and the exaction of an $850,000.00 "conversion contribution" was a deprivation of its constitutional right to Due Process of Law because such action by the City was pursuant to a Zoning Amendment which came into existence *after* Walkbroadway had acquired "vested rights" in its conversion program, and was thus an unlawful deprivation of its property. As the decisions of this Court and the federal judiciary make clear, a party such as Walkbroadway, which incurs substantial expenditures and effort in furtherance of a legitimate business purpose pursuant to a valid permit and in reliance upon existing law acquires a "vested right" to proceed thereunder which cannot be lawfully abrogated by a retroactive ordinance, absent exigent circumstances not present here. In short, the City simply—there is no kinder expression—shook Walkbroadway down for $850,000.00 by an unconstitutional piece of retroactive legislation.

Moreover, either by incompetent drafting or by design, the Amendment was written so as to require payments from Walkbroadway, while exempting other property owners in a completely arbitrary fashion. For example, the Amendment whimsically exempted from the "contribution" requirement certain developers who had undertaken no effort or expense, while forcing Walkbroadway to turn over $850,000.00 after it had incurred huge expenditures to carry out its project under a

valid permit and pursuant to existing law. The policy purpose supposedly furthered by the Amendment (*i.e.*, discouraging developers from "gentrifying" old commercial neighborhoods[3]) is not served by granting immunity to certain developers who lacked any vested right to proceed with the project while imposing harsh financial requirements on parties such as Walkbroadway which had indisputably expended substantial money and effort in reliance upon existing law.

THE QUESTION IS SUBSTANTIAL

It requires no extensive knowledge of New York City politics to understand what is involved in this case and the consequences of permitting the Amendment and the state judicial determinations upholding it to stand. The City made a *post factum* determination to financially penalize a legitimate business, irrespective of its vested rights. The City did not and cannot claim that it was faced with an emergency which might justify the retroactive and discriminatory deprivation of money; it simply wished to amass as much revenue as it could, confident that the state judiciary would meekly rubber stamp its action without any meaningful review. To deprive a party of a vested right retroactively is plainly a violation of Due Process under the decisions of this Court and other federal forums. (See I, *infra.*) Moreover, requiring Walkbroadway to pay $850,000.00 in tribute, despite its strong equitable interests in its project, while exempting less deserving developers without a reason rationally connected to the amendment's legislative purpose, deprived Walkbroadway of its right to Equal Protection of the Laws. (See II, *infra.*)

It is submitted that this matter should be reviewed because, absent some direction from this Court, the City and other municipalities can continue to flout their citizens' constitu-

---

3 This "supposed purpose" of the amendment is itself difficult to fathom in light of the fact that the scarcity of housing in New York City has resulted in continuous "emergency" rent control legislation since World War II.

tional rights without any meaningful judicial review. It would be, to say the least, naive to expect the Courts of New York to scrutinize the City's activities with much sensitivity to constitutional implications. (This conclusion is borne out by the perfunctory treatment accorded this case in the appellate process.)

I.

THE REVOCATION OF APPELLANT'S BUILDING PERMIT AND THE ASSESSMENT OF OPPRESSIVE CONVERSION CONTRIBUTIONS AS A CONDITION TO OBTAINING A NEW PERMIT VIOLATED THE DUE PROCESS CLAUSE

This Court has long recognized and held that the Due Process Clause of the Constitution is violated where retroactive state legislation deprives a party of its right to enjoy a legitimate pecuniary prospect which has become "vested" under valid, pre-existing law. *Ettor v. Tacoma*, 228 U.S. 148 (1913). In that case, it was held that, once a state law had entitled the appellant to receive compensation for injury owing to state action, subsequent legislation purporting to extinguish that right was unconstitutional because it violated the Due Process Clause. In essence, the *Ettor* Court held that, since the appellant's right to compensation had matured under existing law, a subsequent act purporting to abrogate that right was unconstitutional.

Specifically with regard to land use and zoning matters, the federal judiciary has applied this reasoning to declare that, where a land developer had fully complied with all state and local regulations governing the use of its property, it was a violation of Due Process not to approve the plaintiff's development program. *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *cert. den.*, 103 S. Ct. 3539 (1984).

The instant case is an *a fortiori* instance of the retroactive deprivation of a property right in violation of the Due Process Clause. In *Southern Cooperative*, *supra*, the Due Process violation was found to occur before the necessary permits were granted. Indeed, the Court ruled that, since all preliminary steps to obtaining approval had been satisfactorily carried out under existing law, it was the duty of the state officials to grant the necessary permits—a duty which could not be extinguished by subsequent legislation. Here, Walkbroadway had not only taken all the preliminary steps to procure a valid permit under existing laws, it had in fact been granted a valid permit to commence the conversion of its property. The permit was not revoked until hundreds of thousands of dollars had been expended in furtherance of the program and in reliance upon existing law and the validity of the permit. The Zoning Amendment which purported to require owners to pay additional "contributions" and which led the City to revoke the building permit, was not enacted until one month after the building permit was granted and substantial expense was incurred.

The New York courts' summary rejection of Walkbroadway's position that the retroactive legislation unconstitutionally deprived it of a "vested" right was itself in contravention of settled New York decisional law. In New York, it has been repeatedly held that there is a vested right to complete even a non-conforming building project, where "substantial work" has been performed and obligations are assumed in reliance upon a permit lawfully granted. *LeFrak Forest Hills Corp. v. Galvin*, 338 N.Y.S. 2d 932 (2d Dept. 1972), *aff'd mem.*, 32 N.Y. 2d 796, *cert. den.*, 414 U.S. 1004 (1973); *People v. Miller*, 304 N.Y. 105 (1952).

Thus, in proceeding to perform "substantial" work pursuant to a valid permit, Walkbroadway acted, as it had every right to, in reliance upon the existing zoning laws of New York and the decisions of its judiciary. As indicated by the New York cases cited above, the courts of New York have, in other cases, found a deprivation of Due Process of law where substantial work is performed pursuant to a permit even where the use of

the building is non-conforming. *A fortiori*, Walkbroadway was deprived of its constitutionally guaranteed right to Due Process because its vested right was based, not only upon its permit, but also upon the fact that the existing zoning ordinance permitted the use intended without any requirement for *post hoc* exactions of onerous "contributions".

Thus, the substantial work, expenditures, and commitments which Walkbroadway undertook in reliance upon a valid permit and existing law "vested" Walkbroadway with the right to proceed with its project without interference by retroactive legislation. The retroactive assessment of $850,000.00 in "conversion contributions" and the revocation of Walkbroadway's lawful building permit, clearly constitute the taking of property without Due Process of law in violation of the Fourteenth Amendment.

II.

THE ASSESSMENT OF "CONVERSION CONTRIBUTIONS" AGAINST APPELLANT AND PERSONS SIMILARLY SITUATED IRRATIONALLY DISCRIMINATED AGAINST APPELLANT VIS-A-VIS OTHER PROPERTY OWNERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

Quite apart from the City s deprivation of Walkbroadway's vested property rights in violation of the Due Process Clause, the Amendment (p. 2 *et seq.*, *supra*) is rife with loop-holes which irrationally discriminate against Walkbroadway in violation of its right to Equal Protection of the laws.

This Court has indicated that, where state legislation discriminates against certain parties in favor of parties falling into other classifications in a manner which is "irrational" in light of the purposes of the legislation, the Equal Protection Clause is violated. *See, e.g., Vance v. Bradley*, 440 U.S. 93, 97 (1979). We are mindful of this Court's reluctance to overturn state

enactments unless there is no rational nexus between the purpose of the legislation and the classifications created thereby. Nevertheless, however indulgently the Zoning Amendment is read, it is clear that the exemptions granted to certain property holders, but not to Walkbroadway, bear no rational relationship to the supposed purpose of the ordinance and are therefore invalid under the Equal Protection Clause of the Fourteenth Amendment.

As indicated above, Walkbroadway proceeded to incur substantial expenditures and effort under an indisputably valid permit and pursuant to existing law. Among the loop-holes in the ordinance are those set forth in Section 15-013 thereof (p. 4 *supra*.):

> *Building Permits Issued Before the Effective Date of This Chapter*
>
> At the option of the owner, the provisions of this chapter shall not apply to any alteration for which:
>
> (a) plans were filed and pending with the Department of Buildings on September 1, 1980, and a Building Permit was issued by (the effective date of this amendment), or
>
> (b) a variance was granted by the Board of Standards and Appeals prior to (the effective date of this amendment).

To appreciate the degree to which such verbiage irrationally discriminates against Walkbroadway and persons similarly situated, it is, of course, necessary to take note of the professed purposes of the Amendment and the manner *vel non* in which those purposes are served by the discriminatory classifications.

According to the Supreme Court of the State of New York, the purpose of the measure was to maintain the presence of manufacturing and other commercial enterprises in New York City when they might otherwise consider relocating "to the Sun Belt or another out-of-City location" (A. 7a).

Assuming, *arguendo*, that this avowed purpose of the Zoning Amendment is a proper legislative goal of the City, the exemptions to its application served no rational purpose to effectuate that goal. For example, a business which had filed its plans with the City's Department of Buildings prior to September 1, 1980, but had done nothing further to effectuate its project, would be immune from the onerous "conversion contribution." Thus, under the ordinance, one who had done nothing other than apply for a building permit prior to September 1, 1980, would be "grandfathered" under the Amendment. Self-evidently, numerous businesses which otherwise would have been burdened with costs similar to those borne by Walkbroadway, escaped such assessments by the mere happenstance of having their plans on file prior to September 1, 1980.

As stated above, Walkbroadway filed its application and plans in December of 1980 and, upon the grant of the permit, proceeded to carry out its objectives with all due diligence and at great expense. It is submitted that the supposed purpose of the legislation (*i.e.*, to prevent businesses from leaving New York) is in no rational way served by favoring dilatory developers who may have taken no action beyond applying for a building permit before September 1, 1980, while at the same time, penalizing Walkbroadway to the extent of $850,000.00 when it had vigorously pursued its renovation program.

Another unfair and irrational aspect of the Zoning Amendment is the exemption of property owners who had been granted "variances" prior to the effective date of the Zoning Amendment. There is no dispute that Walkbroadway's intended purpose for the building has always been in accord with the Zoning Resolution of New York. Thus, this exemption favors persons whose activities were inconsistent with existing law over persons, such as Walkbroadway, whose plans and actions have always conformed with the zoning requirements of the City.

If the purpose of the Zoning Amendment was to keep businesses in New York, these exemptions are patently irra-

tional. That legislative purpose is not served by imposing the cost of the City's program upon enterprises like Walkbroadway, who have complied with the law and diligently proceeded with their conversion projects, while at the same time providing a discriminatory exemption to persons whose activities would have violated the Zoning Resolution but for the grant of a variance or non-diligent developers who fortuitously filed their applications for building permits prior to September 1980. There is thus no rational nexus between the discriminatory classifications inherent in the exemptions and the avowed goal of the Amendment. Accordingly, because the Zoning Amendment discriminates against Walkbroadway in an entirely irrational manner, it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction on this appeal.

Respectfully submitted,

HERBERT S. KASSNER*
STACY J. HAIGNEY
KASSNER & HAIGNEY
122 East 42nd Street
New York, New York 10168
(212) 557-3755

Attorneys for Appellant
Walkbroadway Realty, Inc.

December 15, 1986

*Counsel of Record

APPENDICES

APPENDIX A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 20, 1986

26423-24

Present—Hon. Joseph P. Sullivan
Justice Presiding
David Ross
J. Robert Lynch
E. Leo Milonas
Ernst H. Rosenberger
Justices.

WALKBROADWAY REALTY, INC.,
Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK,
Defendant-Respondent.

In the Matter of the Application of
WALKBROADWAY REALTY, INC.,
Petitioner-Appellant,

For a Judgment pursuant to Section 668(e)-1.0 of the Administrative Code of the City of New York and Article 78 of the Civil Practice Law and Rules,

—against—

NEW YORK CITY BOARD OF STANDARDS AND APPEALS,
Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from an order and judgment (one paper) of the Supreme Court, New York County (Alfred Ascione, J.), entered on September 10, 1985, and an appeal taken by plaintiff-appellant from a judgment of said court, entered on September 19, 1985,

And said appeals having been argued by Herbert S. Kassner of counsel for plaintiff-appellant/petitioner-appellant, and by Dana Robbins of counsel for defendant-respondent/respondent-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) and the judgment so appealed from be and the same hereby are affirmed, without costs and without disbursements.

ENTER:
HAROLD J. REYNOLDS
Harold J. Reynolds
Clerk.

APPENDIX B

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

Index #3200/85 #9 3/26/85
Index #25071/82 #93 3/26/85
Index #18213/81 #174 3/26/85

In the Matter of the Application of
WALKBROADWAY REALTY, INC.,

Petitioner,

For a Judgment Pursuant to Section 668e-1.0 of the Administrative Code of the City of New York and Article 78 of the Civil Practice Law and Rules,

—against—

NEW YORK CITY BOARD OF STANDARDS AND APPEALS,

Respondent.

ASCIONE, A., J.:

Motions #9 of 3/26/85 (Index #3200/85), #93 of 3/26/85 (Index #25071/82) and #174 of 3/26/85 (Index #18213) are all disposed pursuant to the determination set forth within.

All the motions relate to a piece of commercial property located at 395 Broadway, New York County, which did undergo transformation from commercial tenants to one of residential condominiums. The motions made and discussed relate to the conversion of the property and the problems that have arisen thereto.

In motion #93, the petitioner, Walkbroadway Realty, Inc., ("Walkbroadway"), moves pursuant to CPLR Article 78 to

annul a determination of the respondents, the New York City Board of Standards and Appeals ("B.S.A.").

Petitioner purchased the subject property in January, 1981 [*sic*]. In December, 1980, petitioner submitted to the City an alteration application whereby it sought to convert part of the premises to residential use (the building had been primarily a commercial loft). An alteration permit was approved on March 9, 1981. Based on the approval, petitioner commenced its renovations.

On April 9, 1981, amendments were adopted to Article I, Ch. 5 of the Zoning Resolution affecting residential conversions. The amendments were effective April 9, 1981. They required owners who displaced commercial tenants to pay monies into a Relocation Incentive Plan ("R.I.P.") based on square footage in order to aid in the relocation of commercial tenants. Petitioner was notified in July, 1981, that the petitioner's alteration permit was being revoked for failure to comply with the amendments (if plans were filed with the Department of Buildings on September 1, 1980 and a building permit was issued by April 9, 1981 or a variance was granted by the B.S.A. prior to April 9, 1981, the provisions did not apply).

Petitioner commenced an action (Walkbroadway v. City, Index #18213/81) in 1981 seeking to declare the amendments unconstitutional and its building permit in full force and effect, but it entered into a stipulation with the City whereby the City reinstated the permit and petitioner would deposit in an escrow account the amount equal to the alleged R.I.P. payments owed while petitioner completed its work and pursued its appeal to the B.S.A. as to its requirements to make any R.I.P. payments. In September, 1982, the B.S.A. found the amendments applied to petitioner, and it was obligated to pay $9.00 a square foot in R.I.P. payments.

Petitioner filed a second but related appeal to B.S.A. in July, 1983 whereby petitioner claimed the amendments were not applicable to petitioner at all. Petitioner contended it would not have complied with a law that did not come into effect until April 9, 1981, a time when the plans had been formulated under a prior law.

In November, 1984, the B.S.A. held the petitioner is liable for the R.I.P. payments (in the amount of $848,240).

Petitioner alleges the B.S.A.'s determinations are erroneous and illegal for the reasons set forth in the petition, pgs. 7-14. They include contentions of retroactive statutory construction and irrational classification.

In reply, the respondent states the vast number of conversions from commercial buildings to residential buildings displaced manufacturing and commercial enterprises, jobs have been lost, many violations of various statutes have occurred, and many disputes had occurred between owners and commercial tenants. Thus, the City of New York sought to deal with the many conversions. A Loft Conversion Task Force was established in 1978. It proposed zoning changes for loft conversions including the amendments found offending by the petitioner. After public hearings, the Board of Estimate approved the amendments. The amendments, state respondents, seek to organize the chaotic loft conversion picture below 59th Street in Manhattan.

Owners who seek to make a residential conversion under the amendments must participate in the R.I.P. concept so as to provide relocation funds for displaced commercial and manufacturing enterprises. They are required to pay $9.00 a square foot (of the space that is to be converted). The funds are used to help qualified, displaced firms to re-locate to equal or better facilities. The funds offer other assistance.

Respondent states after the April 9, 1981 enactment of the amendments, the Department of Buildings reviewed all conversion applications and permits affected. Respondent contends the petitioner's building was not "grandfathered" by § 15-013 of the new amendments. Petitioner was told to comply with standard residential provisions or pursuant to the new amendments as noted earlier; only the issue of R.I.P. was the problem.

Respondent notes that on the effective date of the amendments (April 9, 1981) part of petitioner's premises was still being used by non-residential tenants. Thus respondent states the conversion of petitioner's building was subject to the terms

of § 15-01 of the amendments. Respondent states the petitioner does not qualify for any exemptions of the R.I.P. provisions (included reduced R.I.P. based on "direct help" to commercial tenants).

Further, respondent claims the zoning resolutions do not authorize the B.S.A. to grant variances on the general ground of "practical difficulty or unnecessary hardship". Petitioner must demonstrate the fixed criterion set forth in § 72-71 of the zoning resolution, and petitioner never applied for any variance. The B.S.A., therefore, had to strictly interpret the relevant amendments of April 9, 1981, which are provisions of the zoning resolution.

Finally, the respondent states the amendments were enacted after extensive public notice and review and in accordance with all required procedures. Such amendments are, contends respondent, a valid and proper exercise of zoning authority designed to achieve a valid and appropriate objective. Respondent claims the amendments were not applied retroactively to petitioner or anyone else, and no confiscation of property occurred thereby.

In motion designated #174, the City of New York moves, pursuant to CPLR, for summary judgment based on the arguments set forth above by respondent, B.S.A.

In an Article 78 proceeding, deference must be given to the construction accorded to the statutes and regulations by the agency charged with their administration (De Los Santos v. I.N.S., 690 F2d 56). This is especially true where the interpretation of a statute or its application involves knowledge and understanding of the operational practices or entails an evaluation of factual data and inferences to be drawn therefrom (Kurcsics v. Merchant Mutual Insurance Co., 49 NY2d 451).

Also, it is the duty of a court in construing a law or regulation to consider the circumstances under which the enactment was passed and the object to be accomplished by it (U.S.V. Curtis-Nevada Mines, Inc., 611 F2d 1277).

Further, other items which may be considered in the search for the intent of the enactment include the legislative history, the circumstances under which the law or regulation was

passed, the general purpose of the enactment and statements of the draftsmen of the enactment (see Young v. Town of Huntington, 88 Misc2d 632).

The function of the court in an Article 78 proceeding is to review the record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated (Purdy v. Kriesberg, 47 NY2d 354). The standard to be applied in reviewing any penalty imposed by an administrative body is whether such a sanction is so disproportionate to the offense in light of all the circumstances as to be shocking to one's sense of fairness (Matter of Alfieri v. Murphy, 38 NY2d 976; Matter of Pell v. Board of Education, 34 NY2d 222; Freyman v. Board of Regents, 79 AD2d 719).

Here, the respondent B.S.A. is confronted with a difficult task. The area of Manhattan, especially below 59th St., is experiencing a great change. Loft buildings, traditionally the abode of commercial and industrial tenants, are increasingly going residential at the expense of these tenants (usually small to mid-size firms). What could the City of New York do to ease the trauma of the change and keep these commercial and industrial firms and their jobs in New York City? The City has enacted a plan wherein qualified removed tenants will receive direct payments or grants and/or loans from the Business Relocation Assistance Corporation ("B.R.A.C."). The source of these funds is to come from the purchasers of the property who chose to turn commercial loft space to residential units based on the square footage converted. Thus, the R.I.P. plan was instituted.

Such funds help displaced businesses find new locations and help them modernize their facilities. It provides an incentive for these businesses to still contribute to the City economy rather than move to the Sun Belt or another out-of-City location. The method devised, setting up the R.I.P. plan, is extremely fair and logical.

Certainly, the amendments were properly applied to petitioner. Its expenses incurred prior to the construction (it purchased the building in early January, 1981; the amendments were effective April 9, 1981) did not create a "vested interest"

under prior zoning regulations following a zoning amendment (see Syracuse Aggregate Corp. v. Wise, 51 NY2d 278; Sibarco Stations, Inc. v. Town Board of Vestal, 24 NY2d 900; Town of Lloyd v. Kart Wheelers Roseway, Inc., 28 AD2d 1015). Any conversion steps made before the amendments became effective were only preliminary (even the installation of a heating system for approximately $64,000 cannot be said to be directly related to a planned $5,000,000 residential conversion since its use could be deemed consistent with prior commercial use) and petitioner cannot rely on the prior zoning regulations.

Further, the court must consider the fact that the amendments were adopted after public meetings. The court cannot discount the fact that, as stated by respondent, petitioner had constructive and actual knowledge of the pending amendments.

All the above would preclude petitioner from claiming equitable estoppel on the grounds it did not receive notification that its permit would be revoked (based on the amendments) until early August, 1981. Petitioner's original permit was revoked, by operation of law on April 9, 1981 (see Reichenbach v. Windward at Southhampton, 80 Misc 2d 1031).

Also, the court must agree that the petitioner's retroactivity agreement vis-a-vis the amendments is incorrect. A mere preliminary step in obtaining a permit for conversion cannot serve to render the amendments unconstitutionally retroactive. Legislation is not unconstitutional merely because it may have some retroactive effect, or because it operates upon events occurring after its enactment even though antecedents of such events precede the legislation (In re Gato's Estate, 276 App. Div. 651). Also, the validity of the retroactive aspects of an enactment should not be judged strictly from the concept of vested rights but by balancing all factors including considerations of fairness, reliance on pre-existing law, the extent of the retroactivity, and the public interest to be served (Slewett & Farber v. Board of Assessors, 97 Misc2d 637, affd. 78 AD2d 403, vacated 80 AD2d 186, appeal dismissed 54 NY2d 771).

Thus, the amendments are proper, viable and present a lawful exercise of New York City's statutory zoning authority

(see Marcus Associates, Inc. v. Town of Huntington, 45 NY2d 501). Surely, the court cannot agree that the zoning amendments effect an unconstitutional taking of petitioner's property. A municipality by zoning ordinances, may impose restrictions which effect the use, enjoyment and profitability of private property. These restrictions do not violate the constitutional rights of property owners (Golden v. Planning Board of Rompao, 30 NY2d 359). The decision as to how a community should be zoned, as to how various properties should be classified or reclassified rests with the local legislative body and its judgments and determinations will be conclusive unless shown to be arbitrary (Illasi v. City of Long Beach, 38 NY2d 383) and they will be upheld against equal protection challenges if they are reasonable and rationally related to a legitimate objective (Town of Huntington v. Park Shore, 47 NY2d 61).

The burden of showing the zoning classification embodied in zoning amendments are somehow improper and rests with petitioner (Rodgers v. Village of Tarrytown, 302 NY2d 115). Petitioner has not succeeded. The naked invocation of various rights, constitutional and otherwise is not sufficient. The City of New York is faced with a problem and the zoning amendments have a very rational basis and are not arbitrary and capricious. Also, based on the above facts, there is no reason why the City's motion for summary judgment should not be granted. There remains no viable material issue of fact which would serve to deny such a motion (Andre v. Pomeroy, 35 NY2d 361).

Having resolved the above issues, the court may proceed to the final motion.

In motion designated #9 of March 26, 1985, defendants Board of Managers of 395 Broadway Condominium ("395") and Walkbroadway move to dismiss the complaint in Index No. 3200/85 pursuant to CPLR 3211 and 3212.

In February, 1983, a plan was accepted by the Attorney General to convert the subject property to a condominium form of ownership. The premises had been granted J-51 tax benefits. In February, 1984, plaintiffs consisting of the former

commercial tenants of the building brought their action. They, in their first cause of action, seek money damages solely against the price owner, defendant Walkbroadway. In the second cause of action, the plaintiffs move for an order requiring defendant City of New York to revoke the J-51 tax benefits due to the fact Walkbroadway did not pay relocation benefits to plaintiffs. Defendant 395 was named as a defendant since the revocation of the tax benefits would affect the current condominium owners.

Defendant 395 moves to dismiss the complaint on the grounds the plaintiffs have no standing to seek revocation of the benefits, no cause of action is stated, and the plaintiffs failed to properly and timely challenge the J-51 tax benefits pursuant to an Article 78 proceeding (and CPLR 217 with a four-month time limit in which to move).

As to plaintiffs' claim against Walkbroadway for over $332,000, Walkbroadway alleges the claim is based on relocation benefits under § 489, sub 10 of the Real Property Tax Law. Walkbroadway contends the payment of relocation benefits does not apply if the local zoning resolution provides for relocation loans and/or grants in lieu of the benefits under § 489. Walkbroadway cites amendments set forth in Article I, Chapter 5 of the Zoning Resolution of the City of New York (defendants' ex. C) wherein relocation loans and/or grants in lieu of § 489 benefits are expressly provided (it pertains to loft buildings erected before December, 1961. The subject building is approximately 70 years old and B.R.A.C. had determined that the subject building is an "applicable building" under the amendments. See defendants' exhibit E).

In its cross-motion, the City also moves to dismiss the complaint, or, in the alternative, it seeks to amend its answer and consolidate this proceeding with two other actions. City wishes to add those defenses asserted by its co-defendants to its answer.

It further contends the two other proceedings share common issues of law and fact and all three should be consolidated.

In reply, the plaintiffs contend they are entitled to relocation payments due them under the amended resolution. Plaintiffs

were informed by B.R.A.C. that no such payment would be forthcoming due to the fact that no conversion contribution had been made by Walkbroadway. Plaintiffs were informed by B.R.A.C. that they had six months from the time the conversion contribution is made in which to demand payment (see plaintiffs' exhibit H). Since Walkbroadway has not made any payments to plaintiffs, plaintiffs sought payment under § 489, sub. 10 of the RPTL.

The court must agree with defendants. RPTL § 489(i) specifically states the provisions set forth in § 489 sub. 10 shall not apply if local zoning resolutions provides for relocation loans and/or grants in lieu of the benefits (i.e., conversion contributions). The plaintiffs must apply for the relief set forth under the amended zoning resolution to the New York City Business Relocation Assistance Corporation—B.R.A.C. Walkbroadway is not required to pay plaintiffs relocation benefits or awards directly (Walkbroadway has placed an amount equal to the conversion contribution in an escrow account). While commercial tenants displaced by "J-51" conversions who have a right to receive location awards are provided with a specific means of enforcing this right, they may bring an action against the "J-51" applicant (R.P.T.L. § 489[10][g] and Admin. Code § 551-2.5(Z)(8)), these eligible former tenants cannot use the same means to obtain their grants and loans. There are no direct "awards" payable him. The amendments and the location of the building entitle eligible plaintiffs to seek assistance from B.R.A.C.

Thus plaintiffs' first cause of action must be dismissed.

As to the second cause of action, the court agrees with defendants that the plaintiffs have no standing to challenge the City's award of the J-51 tax benefits to the building. They derive no benefit one way or the other—whether J-51 benefits to the building are revoked or if they continue (see Haber v. Board of Estimate, 33 AD2d 571). Assuming, arguendo, the plaintiffs possessed the requisite standing, the proper procedure would have been to attack the J-51 benefits through an Article 78 proceeding. As noted by defendants, plaintiffs time to bring such a proceeding (four months, pursuant to CPLR

217, from the final determination—here J-51 benefits were granted in October, 1982 and increased in April, 1983) had long since passed (this action was commenced in February, 1984), where issues sought to be raised in a declaratory judgment action could and should have been raised in an Article 78 proceeding and where such a proceeding would have been time barred when the declaratory judgment action was commenced, the declaratory judgment action would be time barred as well (CPLR 7801 et seq. Press v. County of Monroe, 50 NY2d 695).

Thus, for the above reasons, defendants' motion to dismiss the action entitled Ben Goldstein & Son, Inc. et al v. Walkbroadway Realty, Inc., Index # 3200/85 is granted. City's cross-motion is denied as moot.

Accordingly, the action entitled "Goldstein v. Walkbroadway Realty, Inc." and "Walkbroadway" are dismissed. In the Article 78 proceeding, petitioner's application is denied and the petition is dismissed.

Settle one order.

Dated: JUL 3 1985

/s/ A. ASCIONE
J.S.C.

APPENDIX C

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, in the Borough of Manhattan, on the 21 day of August, 1985.

ORDER AND JUDGMENT

PRESENT:

HON. ALFRED M. ASCIONE,

JUSTICE.

Index #18213/81

WALKBROADWAY REALTY, INC.,

Plaintiff,

—against—

THE CITY OF NEW YORK,

Defendant.

Index #25071/82

In the matter of the Application of
WALKBROADWAY REALTY, INC.,

Petitioner,

For a Judgment Pursuant to Section 668e-1.0 of the Administrative Code of the City of New York and Article 78 of the Civil Practice Law and Rules,

—against—

NEW YORK CITY BOARD OF STANDARDS AND APPEALS,

Respondent.

Index #3200/85

BEN GOLDSTEIN & SON, INC., LITWIN BROS., INC., IZA TEXTILE, INC., FLIER TEXTILE CORP., HARRY KRUPNICK TEXTILES CO., INC., HARRY MARTINEZ, EUGENE GOLDSCHLANG, FEIT TEXTILE CO., JOSEPH AMELAR INC., IRVING KLAUSNER, CRYSTAL TEXTILE CO., MAX REICH, ADLER PEN & PENCIL CO., CAFER INC. and LEON ZULER,

Plaintiffs,

—against—

WALKBROADWAY REALTY, INC., THE CITY OF NEW YORK and BOARD OF MANAGERS OF 395 BROADWAY CONDOMINIUM,

Defendants.

Plaintiff/petitioner Walkbroadway Realty, Inc. having commenced the above-entitled action (Index No. 18213/81) for a judgment declaring certain amendments to the New York City Zoning Resolution concerning the conversion of non-residential buildings to residential use unconstitutional and void, and defendant City of New York having moved for summary judgment upon all the issues raised in the complaint; and Walkbroadway Realty, Inc. having also commenced the above-entitled proceeding (Index No. 25071/82) pursuant to Article 78 of the CPLR for a judgment annulling the determinations of respondent Board of Standards and Appeals, which conditioned plaintiff/petitioner's conversion of certain premises to residential use upon a payment to the New York City Industrial Relocation Fund; and plaintiffs Ben Goldstein & Son, Inc., *et al.*, having commenced the above-entitled action (Index No. 3200/85) for damages against defendants Walkbroadway Realty, Inc. and Board of Managers of 395 Broadway Condominium and for an injunction directing defendant City of New York to revoke certain tax benefits provided defendant Walkbroadway, and defendants Walkbroadway and Board of Managers having moved for an order dismissing the complaint and defendant City of New York having cross-moved for an

order consolidating that action with the other within matters and granting defendant City leave to amend its answer to the complaint; and all of these matters having come to be heard before me on March 26, 1985.

NOW, upon reading and filing the Notice of Motion, dated February 4, 1985; the Affirmation of Albert G. Fredericks, dated February 4, 1985 and the exhibits annexed thereto; the Affirmation in Opposition of John M. Giordano, dated March 19, 1982 and the exhibits annexed thereto, all concerning the motion for summary judgment in action No. 18213/81; the Notice of Amended Petition, dated December 21, 1984; the Amended Petition, verified by Kenneth Ma on December 21, 1984, and the exhibits annexed thereto; the Answer to Amended Petition, verified by Sylvia Deutsch on February 8, 1985 and the exhibits annexed thereto, and the Return, all concerning proceeding No. 25071/82; and the Notice of Motion, dated February 1, 1985; the Affidavit of Randall Anderson, sworn to February 1, 1985; the Affidavit of Kenneth Ma, sworn to February 1, 1985 and the exhibits annexed thereto; the Notice of Cross-Motion, dated March 1, 1985; the Affirmation of Judith Greenwald, dated March 1, 1985; the Affidavit of Lawrence B. Finkelstein, sworn to March 1, 1985 and the exhibits annexed thereto; the Affirmation in Opposition of Edwin Ostrow, dated March 1, 1985, and the exhibits annexed thereto; and the Reply Affirmation of Lawrence A. Fox, dated March 5, 1985, all concerning action No. 3200/85; and plaintiff/petitioner Walkbroadway Realty, Inc., having appeared in matter Nos. 18213/81 and 25071/82 by Kassner, Haigney and Thomson, and in action No. 3200/85 by Abrams, Lerner, Kisseloff, Kissin & Lapidus, P.C., and defendant City of New York having appeared in matter Nos. 18213/81 and 3200/85 by Frederick A.O. Schwarz, Jr., Corporation Counsel, and respondent Board of Standards and Appeals having appeared in proceeding No. 25071/82 by Frederick A.O. Schwarz, Jr., Corporation Counsel, and plaintiffs Ben Goldstein & Son, Inc., *et al.*, having appeared in action No. 3200/85 by Newman, Aronson & Newman, P.C. and defendant Board of

Managers of 395 Broadway Condominium having appeared in action No. 3200/85 by Abrams, Lerner, Kisseloff, Kissin & Lapidus, P.C., and due deliberation having been had thereon, and upon the decision of the Court dated July 3, 1985. It is ordered that motions 9?, 93 and 174 of March 26, 1985 are combined for disposition and it is further

IT IS ORDERED that the motion of defendant City of New York for summary judgment in action No. 18213/81 is granted, and the clerk is directed to enter judgment accordingly and it is further

IT IS FURTHER ORDERED that the monies deposited by plaintiff/petitioner Walkbroadway Realty, Inc., in the escrow account established pursuant to the stipulation executed by the parties to action No. 18213/81, dated September 24, 1981, be paid over promptly to the New York City Business Relocation Assistance Corporation in accordance with the terms of that stipulation, except that should plaintiff/petitioner serve and file a timely Notice of Appeal from the within Order and Judgment, said monies shall, in accordance with that stipulation, remain on deposit in the account until the determination of the appeal, and

IT IS FURTHER ORDERED AND ADJUDGED that the application in proceeding No. 25071/82 is denied and the petition is dismissed, and

IT IS FURTHER ORDERED that the motion of defendants Walkbroadway Realty, Inc., and Board of Managers of 395 Broadway Condominium to dismiss the complaint in action No. 3200/85 is granted and the complaint is dismissed and the clerk is directed to enter judgment accordingly, and

IT IS FURTHER ORDERED that the cross-motion of defendant City of New York for consolidation and leave to amend its answer in action No. 3200/85 is denied as moot.

AUG 21 1985

ENTER:

/s/ A. ASCIONE
J. S. C.

/s/ Norman Goodman
Clerk

FILED
SEP 10 1985
COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX D

JUDGMENT

Index #18213/81

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WALKBROADWAY REALTY, INC.,

Plaintiff,

—against—

THE CITY OF NEW YORK,

Defendant.

Plaintiff/petitioner Walkbroadway Realty, Inc. having commenced the above-entitled action (Index No. 18213/81) for a judgment declaring certain amendments to the New York City Zoning Resolution concerning the conversion of non-residential buildings to residential use unconstitutional and void, and defendant City of New York having moved for summary judgment upon all the issues raised in the complaint; and Walkbroadway Realty, Inc. having also commenced the above-entitled proceeding (Index No. 25071/82) pursuant to Article 78 of the CPLR for a judgment annulling the determinations of respondent Board of Standards and Appeals, which conditioned plaintiff/petitioner's conversion of certain premises to residential use upon a payment to the New York City Industrial Relocation Fund; and plaintiffs Ben Goldstein & Son, Inc., *et al.*, having commenced the above-entitled action (Index No. 3200/85) for damages against defendants Walkbroadway Realty, Inc., and Board of Managers of 395 Broadway Condominium and for an injunction directing defendant City of New York to revoke certain tax benefits provided defendant Walkbroadway, and defendants Walkbroadway and Board

Managers having moved for an order dismissing the complaint and defendant City of New York having cross-moved for an order consolidating that action with the other within matters and granting defendant City of New York leave to amend its answer to the complaint; and all of these matters having come to be heard before me on March 26, 1985.

NOW, upon reading and filing the Notice of Motion, dated February 4, 1985; the Affirmation of Albert G. Fredericks, dated February 4, 1985 and the exhibits annexed thereto; the Affirmation in Opposition of John M. Giordano, dated March 19, 1982 and the exhibits annexed thereto, all concerning the motion for summary judgment in action No. 18213/81; the Notice of Amended Petition, dated December 21, 1984; the Amended Petition, verified by Kenneth Ma on December 21, 1984, and the exhibits annexed thereto; the Answer to Amended Petition, verified by Sylvia Deutsch on February 8, 1985 and the exhibits annexed thereto, and the Return, all concerning proceeding No. 25071/82; and the Notice of Motion, dated February 1, 1985; the Affidavit of Randall Anderson, sworn to February 1, 1985; the Affidavit of Kenneth Ma, sworn to February 1, 1985 and the exhibits annexed thereto; the Notice of Cross-Motion, dated March 1, 1985; the Affirmation of Judith Greenwald, dated March 1, 1985; the Affidavit of Lawrence B. Finkelstein, sworn to March 1, 1985 and the exhibits annexed thereto; the Affirmation in Opposition of Edwin Ostrow, dated March 1, 1985, and the exhibits annexed thereto; and the Reply Affirmation of Lawrence A. Fox, dated March 5, 1985, all concerning action No. 3200/85; and plaintiff/petitioner Walkbroadway Realty, Inc., having appeared in matter Nos. 18213/81 and 25071/82 by Kassner, Haigney and Thomson, and in action No. 3200/85 by Abrams, Lerner, Kisseloff, Kissin & Lapidus, P.C., and defendant City of New York having appeared in matter Nos. 18213/81 and 3200/85 by Frederick A.O. Schwarz, Jr., Corporation Counsel, and respondent Board of Standards and Appeals having appeared in proceeding No. 25071/82 by Frederick A.O. Schwarz, Jr., Corporation Counsel, and plaintiffs Ben Goldstein & Son,

Inc., *et al.*, having appeared in action No. 3200/85 by Newman, Aronson & Newman, P.C. and defendant Board of Managers of 395 Broadway Condominium having appeared in action No. 3200/85 by Abrams, Lerner, Kisseloff, Kissin & Lapidus, P.C., and due deliberation having been had thereon, and upon the decision of the Court dated July 3, 1985.

IT IS ADJUDGED that the motion of defendant City of New York for summary judgment in action No. 18213/81 is granted.

Norman Goodman
Clerk

FILED
SEP 19 1985
COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX E

COURT OF APPEALS
STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A.D. 1986

PRESENT,

HON. SOL WACHTLER,
Chief Judge, presiding.

1-10 Mo. No. 695

In the Matter of WALKBROADWAY REALTY, INC.,
Appellant,

For a Judgment &c.,

—vs.—

NEW YORK CITY BOARD OF STANDARDS AND APPEALS,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal taken as of right by the appellant in the above cause be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

APPENDIX F

IN THE COURT OF APPEALS
STATE OF NEW YORK

No. N.Y. Co. Clerk Index No. 18213/81 and 20571/82
(Ct. of Appeals Mo. No. 695)

WALKBROADWAY REALTY, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Walkbroadway Realty, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals to the State of New York, denying the motion for leave to appeal and dismissing appellant's appeal as of right entered in this action on September 16, 1986.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

/s/ STACY J. HAIGNEY
Counsel for Appellant
KASSNER & HAIGNEY
122 East 42nd Street
New York, New York 10168
(212) 557-3755

TO: Frederick A.O. Schwarz, Jr.
Corporation Counsel
Attorney for Defendant and Respondent
100 Church Street
New York, New York 10007
(212) 566-4412

APPENDIX G

AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.

WALKBROADWAY REALTY, INC.,

Plaintiff,

—against—

THE CITY OF NEW YORK,

Defendant.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

VINCENT W. CHOW, being duly sworn, deposes and says:

1. I am president of the plaintiff herein, WALKBROADWAY REALTY, INC. (hereafter "REALTY"). I submit this affidavit in support of a motion for a preliminary injunction enjoining the defendent, THE CITY OF NEW YORK (hereafter "CITY"), from enforcing or implementing a certain revocation order, dated July 30, 1981,* revoking REALTY's alteration application number 1202/80 and its building permit issued thereunder, with respect to the building at 395 Broadway, New York, New York (hereafter "the PREMISES").

2. REALTY is the owner of the PREMISES, having closed title on January 15, 1981. On or about September 30, 1980,

---

* (A copy of the Revocation Order is annexed hereto as Exhibit "A")

REALTY entered into a contract with the prior owner to purchase the PREMISES for the sum of $1,927,500.00. Thereafter, on December 8, 1980, REALTY filed an alteration application, number 1202/80, with the Building Department of the City of New York in order to convert the thirteen upper stories to residential use. The alteration application was approved by the CITY on March 9, 1981. As a result, substantial alterations and renovations of the PREMISES began including the demolition and gutting of the upper thirteen stories. The PREMISES is vacant and, since all the essential facilities have been removed during the renovation, it is non-income producing and uninhabitable. Considerable money has been spent in reliance upon the CITY's building permit. When the permit was issued there was no impediment whatsoever for REALTY to convert the PREMISES to residential use.

3. The PREMISES consists of fifteen stories, of which the top thirteen stories are in the process of conversion to residential apartments, encompassing approximately 85,000 square feet of space. A general contractor was hired under written contract obligating REALTY to pay $2,400,000.00 for only a part of the basic improvements. The total costs to renovate and carry the PREMISES to completion of the renovation will amount to approximately $5,000,00.00. Considerable work has been done under the contract to date, and the general contractor has already been paid over $150,000.00. Besides gutting the PREMISES, we have installed a new heating plant for $63,850.00, we have paid approximately $35,000.00 in architectural fees and expenses, incurred obligations for over $80,000.00 in legal fees, over $10,000.00 to the mechanical engineers, and have incurred numerous other expenses and fees to undertake the renovation. For example, I have paid a non-refundable fee of $37,500.00 to the European American Bank & Trust Company (hereafter "BANK"), for a $5,000,000.00 construction loan. A copy of the loan commitment is annexed hereto as Exhibit "B". The loan was scheduled to be closed on August 17, 1981. However, as a result of the CITY's revocation order, discussed hereafter, the BANK has refused to close the construction loan and the

closing has been adjourned without a date. Funds to continue the renovation are therefore unavailable and unless the revocation order is promptly lifted or its implementation enjoined, REALTY stands to lose its investment and the entire project may be lost before a final determination can be had in this lawsuit.

4. The revocation order issued by the CITY was issued under Section C26-118.7 of the Adminstrative Code by reason of REALTY's alleged failure to comply with Article 1, Chapter 5 of a newly enacted amendment to the Local Zoning Resolution (hereafter "ZONING RESOLUTION"), recently passed by the City Council and the Board of Estimate and enacted into law on April 9, 1981. The ZONING RESOLUTION was passed well after REALTY purchased the PREMISES and secured its alteration application and building permit. The ZONING RESOLUTION relates to the conversion of building from non-residential to residential use. The ZONING RESOLUTION speaks of procedures to be followed before a building permit is issued. Nevertheless, the CITY has taken the position that the ZONING RESOLUTION is to be applied retroactively to REALTY, and has revoked our alteration application because REALTY did not pay a fee of approximately $765,000.00 pursuant to Section 15-531 of the ZONING RESOLUTION, as discussed hereafter.

5. In essence, the ZONING RESOLUTION provides that a developer wishing to convert an applicable commercial building for residential use must now do one or two things before he is entitled to receive a building permit. He must either pay $9.00 per square foot of the gross floor area to be used for the residential dwelling units to the "Industrial Relocation Fund" prior to the CITY's issuance of a building permit or, alternatively make a "Direct Help Payment" of $4.50 to the eligible tenants under Section 15-541 of the ZONING RESOLUTION, thereby saving 50% of the contribution he otherwise is required to pay. The ZONING RESOLUTION speaks only to such contribution prior to the issuance of a building permit, it makes no provision for the revocation of permits or alteration applications lawfully issued prior to the enactment of the law.

6. The application provisions of the ZONING RESOLUTION, Article I, Chapter 5 are detailed below:

15-013—Building Permits Issued Before the Effective Date of This Chapter

At the option of the owner, the provisions of this chapter shall not apply to any alteration for which:

(a) plans were filed and pending with the Department of Buildings on September 1, 1980 and a building permit was issued by the effective date of this amendment.

Section 15-52—Conversion Contribution

A "conversion contribution" is the contribution to the Industrial Relocation Fund provided by the owner of an applicable building. Such contribution shall be provided by the owner in order to convert such building to dwelling units or joint living-work quarters for artists without meeting the requirements for the development of dwelling units in Article 2.

The Corporation

The "Corporation" is a New York City Business Relocation Assistence Corporation, a not for profit corporation. . . .

The Fund

The "Fund" is the Industrial Relocation Fund. The Fund is established with the Corporation. The Corporation shall accept the conversion contribution to be accredited to the Fund and apply such monies towards the relocation of industrial tenants . . . or towards the administration of the Fund, and for such other purpose relating to industrial relocation as the Corporation may determine.

Section 15-531—Rate of Contribution

The conversion contribution shall be paid into the Fund. If tendered prior to September 1, 1982 such contribution shall be at the rate of $9.00 per square foot for the gross floor area to be used for dwelling units . . . .

Section 15-532—Contribution Procedure

(a) Prior to the issuance of an Alteration Permit, the owner shall pay the conversion contribution, in an amount equal to the rate applicable at the date of payment multiplied by the gross floor area as provided in Section 15-531. The amount of such contribution may be reduced by authorization of the Board of Standards and Appeals pursuant to Section 15-54 (Direct Help) or Section 15-55 (Additional Discounts or Exclusions from Conversion Contributions). . . .

Section 15-540—Direct Help

The Board of Standards and Appeals shall issue an authorization for a discount from all or part of the amount of the conversion contribution when it determines that the owner of an applicable building has made a direct help payment in accordance with Section 15-541 through Section 15-545. The amount of the discount shall be twice the direct help payment provided to the recipient as required in Section 15-541.

Section 15-541—Amount of Direct Help Payment

(a) The direct help payment shall be equal to 50% of the conversion contribution. To entitle the owner of an applicable building to be eligible for the discount authorized under Section 15-540, such owner shall make direct help payments

in accordance with the following . . . (as applicable hereto entitling owner to a 50% discount).

7. The CITY has revoked our alteration application and building permit, not because of any impropriety with respect to the alterations themselves, but simply because of an administrative decision by the CITY to revoke my alteration application and coerce me into paying approximately $765,000.00 into the Fund, or face the consequences of having all work stopped and the resultant probability of losing our entire investment. The CITY's revocation of my alteration permit because the conversion contribution was not paid is an unconstitutional application of the ZONING RESOLUTION for the following reasons:

a) When we purchased the PREMISES, received our approved alteration application and building permit and thereafter expended considerable monies to renovate the PREMISES, the ZONING RESOLUTION had not been enacted and REALTY had fully complied with the existing law;

b) REALTY never would have purchased the building for $1,927,500.00 had it known that the CITY would retroactively charge a fee of $765,000.00, over 40% of the purchase price;

c) Although all owners seeking to convert their buildings since the enactment of the law have an opportunity to make "Direct Help Payments" to tenants and thereby pay only $4.50 a square foot toward the Conversion Contribution, I was never afforded an opportunity to do so as the ZONING RESOLUTION did not exist when REALTY purchased the PREMISES or secured its building permit;

d) REALTY complied with all existing law when it secured its permit; it has substantially changed its position in the intervening six months, and now that its building permit has been revoked no funds are available to either proceed with the project or make the requested contribution should the Court hold that the ZONING RESOLUTION can be applied retroac-

tively, as the BANK has refused to close the construction loan while the alteration application revocation is in existence.

e) Owners who secured a building permit or had secured variances prior to September 1, 1980 are not required to make any payment contribution even if no change of circumstances took place. There is no reasonable basis to discriminate against REALTY whose position changed materially since the permit issued.

8. A weighing of the equities cries out for the granting of a preliminary injunction herein. *The CITY's claim is solely for monetary damages*, i.e. REALTY's contribution to the Fund. It is not based upon the fact that REALTY made any false statement or misrepresentation of material fact in its alteration application or that the permit was issued in error, nor is it alleged that any dangerous or unsafe condition exists at the PREMISES necessitating a stop work order.

9. The CITY could easily have instituted an action for collection of the proceeds and, if successful, the PREMISES are certainly available as a source of funds should it be determined that REALTY owes the contribution to the Fund. The ZONING RESOLUTION was enacted over four months ago. The CITY knew that REALTY's permit was issued and that substantial expenditures and change of position would necessarily result. Had they sought judicial intervention promptly, this matter would have already been resolved as the issue to be determined is essentially a matter of law and should be decided summarily. However, instead of affording REALTY an opportunity to seek a judicial pronouncement, the CITY's action has effectively destroyed REALTY's ability to make use of the property without affording REALTY basic due process protection before the destruction of REALTY's rights with respect to the property.

10. The revocation of REALTY's alteration application and work permit will cause REALTY incalculable losses and may actually result in the loss of the project. It has already resulted in the refusal of the BANK to close its construction loan, thereby depriving REALTY of funds to continue with the pro-

ject. REALTY faces the untenable consequences of being in breach of its contract with the general contractor and its other suppliers and materialmen, while still being forced to carry the building including the payment of taxes to the CITY while the PREMISES remain totally non-income producing. The issue herein is solely one of law and should be resolved expeditiously. Unless preliminary injunctive relief is granted forthwith, our damage will be immediate and irreparable, yet no resulting damage or prejudice will result to the CITY should the *status quo* be maintained.

11. No application for the same or similar relief requested herein has been made heretofore.

WHEREFORE, it is respectfully prayed that the Court issue a preliminary injunction enjoining the CITY from taking any steps to enforce or implement its revocation order dated July 30, 1981, and for such other and further relief as to the Court may seem just and proper.

/s/ VINCENT W. CHOW
VINCENT W. CHOW

Sworn to before me this
14th day of August, 1981

/s/ LAWRENCE A. FOX
LAWRENCE A. FOX
NOTARY PUBLIC, State of New York
No. 01F06371500
Qualified in Westchester County
Commission Expires March 30, 1982

FILED
JAN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No 86-994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

WALKBROADWAY, REALTY, INC.,

Appellant,

-vs.-

THE CITY OF NEW YORK,

Appellee,

ON APPEAL FROM THE NEW YORK
STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

DORON GOPSTEIN,
Acting Corporation Counsel
for the City of New York,
Attorney for Appellee,
100 Church Street,
New York, New York 10007
(212) 566-4022 or 3323

LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,
DANA MARTINE ROBBINS,
of Counsel.

January 14, 1986

40 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT	1
QUESTION PRESENTED	2
FACTS	3
OPINIONS BELOW	13
ARGUMENT	
THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION. THE ZONING AMENDMENTS, WHICH CONDITION THE GRANT OF A PERMIT TO CONVERT A BUILDING FROM COMMERCIAL TO RESIDENTIAL USE UPON A PAYMENT TO THE INDUSTRIAL RELOCATION FUND, ARE A LEGITIMATE AND CONSTITUTIONAL EXERCISE OF THE ZONING POWER	17
CONCLUSION	33

TABLE OF AUTHORITIES

Page

Cases:

Matter of Andgar Associates v. Board of Zoning Appeals of Incorporated Village of Port Washington North, 30 AD2d 672 (2nd Dept.), app. den'd, 22 NY2d 648 (1968) 26

Church v. Town of Islip, 8 NY2d 254 (1960) 20

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 30

Cooper v. Dubow, 41 AD2d 843 (2nd Dept.), app. den'd, 33 NY2d 518 (1973) 24

In Re Gato's Estate, 276 App. Div. 651 (lst Dept.), aff'd, 301 NY 653 (1950) 15

Matter of Golden City Park Corp. v. Board of Standard and Appeals of the City of New York, 263 App. Div. 52 (2nd Dept., 1941), aff'd, 289 NY 720 (1972) 26

Golden v. Planning Board of Town of Ramapo, 30 NY2d 359 (1972) 16

Gramatan Hills Manor, Inc. v. Manganiello, 30 Misc. 2d 117 (Sup. Ct., Westchester Co., 1961) 26

Holmes v. Planning Board of Town of New Castle, 78 AD2d 1 (2nd Dept., 1980) 20

Illasi v. City of Long Beach, 38 NY2d 383 (1976) 16

Matter of Jayne Estates v. Raynor 22 NY2d 417 (1968) 24

Jenad, Inc. v. Village of Scarsdale, 18 NY2d 78 (1966) 20

LeFrak Forest Hills Corp. v. Galvin, 40 AD2d 211 (2nd Dept., 1972), aff'd, 32 NY2d 796 (1973), cert. denied, 414 US 1004 (1973) 24

Marcus Associates, Inc. v. Town of Huntington, 45 NY2d 501 (178) 15

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 19, 27

Matter of Perrotta v. City, 107 AD2d 320, aff'd, 66 NY2d 859 (1985) 24

Reichenbach v. Windward at Southhampton 80 Misc. 2d 1031 (Sup Ct., Suffolk Co.), aff'd on opn. below, 48 AD2d 909 (2nd Dept., 1975), app. dism'd, 38 NY2d 710 (1976) 26

Rogin v. Bensalem Township, 616 F. 2d 680 (3rd Cir., 1980), cert den'd, 450 U.S. 1029 (1981) 22, 30

Stewett & Farber v. Board of Assessors, 97 Misc. 2d 637 (Sup. Ct., Nassau Co., 1978) aff'd, 78, AD2d 403 (2nd Dept., 1981), mod., 80 AD2d 186 (2nd Dept.), app dism'd, 54 NY2d 771 (1981) .. 15

Southern Cooperative Development Fund v. Driggers, 696 F2d 1347 (11th Cir), cert denied, 463 U.S. 1208 (1983) 23

State ex. rel. Van Emmerik v. Janklow, 454 U.S. 1131 (1982) .. 21

Syracuse Aggregate Corp. v. Weise, 51 NY2d 278 (1980) 24

Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc, 47 NY2d 61 (1979) 16

Town of Lloyd v. Kart Wheelers Raceway, Inc. 28 AD2d 1015 (3rd Dept., 1967) 26

United States v. Jacobs, 306 U.S. 363 (1939) 21

Vance v. Bradley, 440 U.S. 93 (1979) 30

Village of Belle Terre v. Boraas, 416 US 1 (1974) 30

Village of Euclid, Ohio v. Ambler Realty, 272 US 365 (1926) 19

In the Matter of Walkbroadway Realty, Inc. v. New York City Board of Standards and Appeals, 120 AD2d 958 (lst Dept.), app. dism'd, 68 NY2d 804 (1986) 16, 17

Statutes:

New York City Zoning Resolution, Article 1, Chapter 5, §15-50 et seq ..... inter alia

Other authorities:

Rathkopf, The Law of Zoning and Planning, Fourth Edition (1965) 24, 25 26

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALKBROADWAY REALTY, INC.,

Appellant

- vs. -

THE CITY OF NEW YORK,

Appellee,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

The appellee, the City of New York, moves to dismiss the appeal herein, or, in the alternative, to affirm the final order of the Court of Appeals of the State of New York entered on September 16, 1986, on the ground that the appeal does not present a substantial federal question.

QUESTIONS PRESENTED

1. Does the amended zoning resolution, which requires a developer undertaking the conversion of a commercial property to residential use to contribute to a fund for the relocation of displaced commercial and industrial tenants, deprive Walkbroadway Realty, Inc. of its right to due process of law, where the zoning amendment requiring the contribution became law after Walkbroadway acquired its alteration permit but before it undertook any substantial construction work or completed the eviction of the tenants?

2. Is the equal protection guarantee of the fourteenth amendment of the United States constitution violated by the "grandfather clause" of the zoning amendments, which exempts from the conversion contribution requirements owners who applied for a permit prior to the public

announcement of the City's proposed loft conversion policy and received the permit before enactment of the law, and owners who obtained a variance and permit prior to the enactment of the amendments?

FACTS

This appeal concerns the application of certain amendments of the Zoning Resolution of the City of New York to the proposed conversion from commercial to residential use of a "loft" building purchased by appellant Walkbroadway Realty, Inc. The Amendments, Article 1, Chapter 5, of the Zoning Resolution, govern the conversion of all premises in Manhattan Community Districts 1, 2, 3, 4, 5, and 6, erected prior to December 15, 1961. Section 15-50, et seq, the Relocation Incentive Program ("RIP"), of the Amendments conditions the conversion of premises from commercial or

industrial to residential use upon payment of a conversion or "RIP" contribution to the Industrial Relocation Fund administered by the New York City Business Relocation Assistance Corporation ("BRAC") or upon direct relocation payments to the tenants.

The amendments "grandfather" two classes of owners, permitting owners who obtain a permit before April 9, 1981, based upon an application filed with the Buildings Department on or before September 1, 1980, and owners who were granted a variance by the Board of Standards and Appeals ("BSA") prior to April 9, 1981, to proceed without regard to the provisions of Chapter 5.

The premises which are the subject of this proceeding are a fifteen story building located at 395 Broadway in an area of lower Manhattan zoned as a C6-4 commercial district. Walkbroadway Realty, Inc. ("Walkbroadway") entered into a

contract of purchase for the subject premises on September 30, 1980.

Prior to execution of Walkbroadway's contract for purchase of the subject premises, on September 2, 1980, amendments to the Zoning Resolution ("the Amendments"), governing the conversion of nonresidential buildings in lower Manhattan to residential use, were proposed, and certified for public review by the New York City Planning Commission ("Planning Commission"). In the course of these public hearings, an official of the New York City Planning Commission informed Walkbroadway that, if enacted, the amendments would apply to the conversion of the subject premises.

On December 8, 1980, Walkbroadway filed an alteration application with the New York City Department of Buildings ("Buildings Department") for

conversion of the subject premises from warehouse facilities to residential apartments.

On February 9, 1981, the Planning Commission adopted a resolution incorporating the Amendments into the Zoning Resolution (A101). Thereafter, the New York City Board of Estimate conducted further public hearings, and approved the Amendments, effective April 9, 1981 (A101).

The Buildings Department approved the application on March 6, 1981, issuing petitioner an alteration permit authorizing the conversion of the subject premises on March 9, 1981. However, as Walkbroadway had made no conversion contributions to BRAC or direct relocation payments to its tenants, the Manhattan Borough Superintendent of the Buildings Department, by letter dated July 30, 1981, notified Walkbroadway that its proposed conversion of the subject premises did not

comply with the Amendments, and that its alteration permit was accordingly revoked.

On August 14, 1981, appellant commenced an action, Walkbroadway Realty, Inc. v. City of New York, in the New York State Supreme Court, seeking a declaration that the amendments were unconstitutional as applied to it and asking for a permanent injunction prohibiting their enforcement against it. At the same time, Walkbroadway moved for a preliminary injunction against the City's enforcement of the Borough Superintendent's revocation order. Walkbroadway asserted that the choice between revocation of the permit or the necessity of making a cash contribution would cause it irreparable financial injury and the loss of the whole project. In support of this claim, Walkbroadway averred that out of a renovation project expected to

cost five million dollars it had already invested a total of $376,350, as follows:

a) $150,000 general contractor

b) $63,850.00 new heating plant

c) $35,000.00 architectural fees

d) $80,000 legal expenses

e) $10,000 mechanical engineers

f) $37,500 bank fee for construction loan[1]

The City cross moved to dismiss the complaint on the grounds that necessary parties had not been joined and that petitioner had failed to exhaust its administrative remedies by appeal to the BSA. On September 24, 1981, Walkbroadway and the City stipulated to the withdrawal of

---

[1] Walkbroadway also asserted that it had signed a contract "obligating" it to pay $2,400,000 for renovations. No contract was presented to the Court to support this naked claim.

the motions by both parties, the reinstatement of petitioner's alteration permit, and Walkbroadway's deposit into an escrow account of approximately one-half of the amount of RIP payments which Walkbroadway would owe if the Court were to hold the amendments applicable to it. The stipulation also required Walkbroadway to file an application with the BSA for a determination of the precise amount of the contribution which would be required of it if the City prevailed in the action. On or about November 5, 1981, Walkbroadway filed an administrative loft conversion ("ALC") application with the BSA for a determination of the amount of its RIP contribution. Walkbroadway took the position that it was entitled to the discount in §15-54 granted to owners who make direct payments to the tenants prior to their eviction because it was precluded from making direct help payments

by the fact that it obtained its permit before the law went into effect (A170). However, at the hearing on June 8, 1982, Walkbroadway's attorney conceded that most of the tenants vacated after the passage of the law in April, 1981[2], and stated that Walkbroadway had elected not to set up an escrow account for displaced commercial tenants based on its belief that it was not subject to the zoning amendments.

At the close of a further hearing on September 28th, the BSA determined that Walkbroadway's conversion of the subject premises required a non-discounted RIP contribution of $848,254.50.

---

[2] According to the attorney for the tenants who was also present at the hearing, many of the tenants were evicted in July, 1981, over three months after passage of the Amendments.

During the pendency of the ALC proceeding, Walkbroadway also filed an application with the BSA appealing from the Buildings Department's determination that the conversion of the subject premises was subject to the Amendments, and seeking an amelioration of the hardship it alleged would result from such application. On November 27, 1984, the BSA approved a resolution holding that the Amendments did apply to the subject premises. The BSA concluded that it was not empowered to address the equitable arguments raised by the applicant, and, accordingly, affirmed the determination of the Buildings Department.

By an Amended Petition, noticed December 21, 1984, Walkbroadway commenced an action (Walkbroadway v. City and BSA) pursuant to CPLR Article 78 challenging the determinations of the BSA. In the petition, Walkbroadway alleged that the decision of the

BSA was arbitrary and capricious; that the issuance of an alteration permit equitably estopped the City from applying the amendments to Walkbroadway; that the amendments were a taxation measure beyond the scope of the BSA; and that the amendments constituted a taking of property without just compensation, in violation of the due process clause of the fourteenth amendment to the United States Constitution. Walkbroadway further alleged that the grandfather clause of the amendments created various irrational distinctions in violation of the equal protection clause of the fourteenth amendment.

At the same time, the declaratory action (Walkbroadway v. City) was also restored to the calendar. Motions in both the declaratory judgment action and the Article 78 proceeding came before Special Term of

the New York State Supreme Court at one time.

OPINIONS BELOW

Special Term dismissed both actions brought by Walkbroadway. The Court noted the aim of the amendments:

> Here, the respondent B.S.A. is confronted with a difficult task. The area of Manhattan, especially below 59th St., is experiencing a great change. Loft buildings, traditionally the abode of commercial and industrial tenants, are increasingly going residential at the expense of these tenants (usually small to mid-size firms). What could the City of New York do to ease the trauma of the change and keep these commercial and industrial firms and their jobs in New York City? The City has enacted a plan wherein qualified removed tenants will receive direct payments or grants and/or loans from the Business Relocation Assistance Corporation ("B.R.A.C."). The source of these funds is to come from the purchasers of the property who chose to turn commercial loft space to residential units based on the square footage converted. Thus, the R.I.P. plan was instituted.

> Such funds help displaced business find new locations and help them modernize their facilities. It provides an incentive for these businesses to still contribute to the City economy rather than move to the Sun Belt or another out-of-City location. The method devised, setting up the R.I.P. plan, is extremely fair and logical.

The Court found that the amendments were properly applied to petitioner which had not acquired vested rights under the permit as "[a]ny conversion steps made before the amendments became effective were only preliminary." The Court also rejected Walkbroadway's argument that the City was equitably estopped from revoking its permit, finding that "petitioner had constructive and actual knowledge of the pending amendments." The Court addressed the constitutional issues:

> Also, the Court must agree that the petitioner's retroactivity agreement [sic] vis-a-vis the amendments is incorrect. A mere

preliminary step in obtaining a permit for conversion cannot serve to render the amendments unconstitutionally retroactive. Legislation is not unconstitutional merely because it may have some retroactive effect, or because it operates upon events occurring after its enactment even though antecedents of such events precede the legislation (In Re Gato's Estate, 276 App. Div. 651). Also, the validity of the retroactive aspects of an enactment should not be judged strictly from the concept of vested rights but by balancing all factors including considerations of fairness, reliance on preexisting law, the extent of the retroactivity, and the public interest to be served (Slewett & Farber v. Board of Assessors, 97 Misc2d 637, aff'd. 78 AD2d 403, vacated 80 AD2d 186, appeal dismissed 54 NY2d 771).

Thus, the amendments are proper, viable and present a lawful exercise of New York City's statutory zoning authority (see Marcus Associates, Inc. v. Town of Huntington, 45 NY2d 501). Surely, the court cannot agree that the zoning amendments effect an unconstitutional taking of petitioner's property. A municipality by zoning ordinances, may impose restrictions which effect the use, enjoyment and profitability of private property. These restrictions do not violate the constitutional rights of

> property owners (Golden v. Planning Board of Ramapo, 30 NY2d 359). The decision as to how a community should be zoned, as to how various properties should be classified or reclassified rests with the local legislative body and its judgments and determinations will be conclusive unless shown to be arbitrary (Iliasi v. City of Long Beach, 38 NY2d 383) and they will be upheld against equal protection challenges if they are reasonable and rationally related to a legitimate objective (Town of Huntington v. Park Shore, 47 NY2d 61).

Concluding that petitioner had failed to meet its burden of establishing the invalidity of the zoning amendments, the court noted that "[t]he naked invocation of various rights, constitutional and otherwise is not support."

The New York State Supreme Court, Appellate Division, First Department, in an order entered May 20, 1986, and reported at 120 AD2d 998, unanimously affirmed the judgment and order of the Supreme Court at Special Term.

The New York State Court of Appeals, on its own motion, in a judgment entered September 16, 1986, and reported at 68 NY2d 804 dismissed the appeal on the ground that no substantial constitutional question is directly involved.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION. THE ZONING AMENDMENTS, WHICH CONDITION THE GRANT OF A PERMIT TO CONVERT A BUILDING FROM COMMERCIAL TO RESIDENTIAL USE UPON A PAYMENT TO THE INDUSTRIAL RELOCATION FUND, ARE A LEGITIMATE AND CONSTITUTIONAL EXERCISE OF THE ZONING POWER.

The purpose of the Zoning Amendments, Article 1, chapter 5 of the Zoning Resolution of the City of New York, specifically §15-50 et seq, the Relocation Incentive Program ("RIP"), is stated in the preamble to this section:

15-51
Preamble

In order to reduce the deleterious effects on commercial and manufacturing uses caused by the reduction of existing floor area available to such uses as the result of the conversion of nonresidential buildings to dwelling units or joint living work quarters for artists, thereby increasing the value of such buildings, a Relocation Incentive Program is established. These general goals include among others the following specific objectives

a) To provide incentives for eligible commercial and manufacturing uses displaced by the conversion of commercial or manufacturing buildings or portions thereof to dwelling units, to relocate within the City of New York

b) To provide certainty to eligible commercial and industrial tenants as to the extent and availability of relocation incentives.

c) To ensure that such incentives are available to the eligible commercial or manufacturing uses at the time they relocate.

d) To assist in the retention of industrial firms and industrial relocation

> within the City of New York in accordance with the intent of this Chapter.

To this end, owners seeking to convert a structure from commercial to residential use are required to make a Relocation Incentive Program contribution into the Industrial Relocation Fund administered by the New York City Business Relocation Assistance Corporation.

It is well established that a zoning ordinance is a permissible exercise of the police power if its restrictions bear a substantial relation to the health, welfare and safety of the community. See Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365 (1926). It is beyond cavil that the zoning amendments, requiring a developer to contribute to a fund for the relocation of displaced industrial tenants prior to the

conversion of a commercial building to residential units, are a valid expression of the legislative goal.[3]

Notwithstanding appellant Walkbroadway's insinuation that it has been somehow victimized by the political system in New York City and forced to pay "tribute" (juris st., p. 7) to a greedy municipality blindly amassing revenue, the application of the Zoning Amendments to Walkbroadway has

---

[3] The courts of New York State have long held that a zoning scheme may be implemented through the imposition of conditions, including cash contributions, upon selected types of development. Jenad, Inc. v. Village of Scarsdale, 18 NY2d 78 (1966) (approval of subdivision conditioned on local dedication requirement, including cash contribution option); Church v. Town of Islip, 8 NY2d 254 (1960) (change of zoning designation conditioned on size limitations, erection of fence, and planting of shrubbery); Holmes v. Planning Board of Town of New Castle, 78 AD2d 1 (2nd Dept., 1980) (permit conditioned on participation in overall development plan, including agreement to provide driveway easement).

not resulted in any deprivation of appellant's constitutional rights.[4]

The revocation of appellant's alteration permit was not an impermissible retroactive application of the zoning amendments. Appellant's due process rights were not violated.

Legislation is not impermissibly retroactive merely because it may have an impact on events having their antecedents before its enactment. United States v. Jacobs, 306 U.S. 363 (1939). See also State ex. rel. Van Emmerik v. Janklow, 454 U.S. 1131 (1982) (challenge to retrospective tax on utility; appeal dismissed for want of a substantial question). The Amendments, effective one month after Walkbroadway was

---

[4] Appellant's attack on the impartiality of the New York State judiciary (juris st., p. 8) is utterly without factual foundation, and wholly improper.

granted an alteration permit, required Walkbroadway to make a conversion contribution for the benefit - either direct or indirect - of commercial tenants who were not evicted until some time after passage of the Zoning Amendments. Thus, the Amendments actually operate prospectively upon the evictions of tenants occurring after their effective date. The fact that the necessity of making the RIP payment may diminish the profits which appellant expected when it purchased the premises in September 1980, does not make application of the statute impermissibly retroactive. In Rogin v. Bensalem Township, 616 F2d 680 (3rd Cir. 1980), cert. den., 450 U.S. 1029 (1981) the Court of Appeals for the Third Circuit ruled that there was no violation of due process to a developer who was denied additional permits necessary to complete a condominium project, where the zoning

ordinance was amended to reduce permissible density midway through construction of the planned project. Southern Cooperative Development Fund v. Driggers, 696 F2d 1347 (11th cir), cert den'd., 463 US 1208 (1983), relied on by appellant (juris st., p. 8), is not to the contrary. In that case, the Court held that the Planning Commission could not deny a permit based on a subsequently enacted development code, where the developer, in consultation with the Commission, had changed its plans to comply with regulations in effect at the time of its application for a permit. The Court based its holding on the doctrine of equitable estoppel, finding that the Commission had deliberately delayed action on the developer's

application until the enactment of the zoning amendments.[5]

Nor has appellant been deprived of vested rights under New York law (juris. st., p. 9). See Matter of Jayne Estates v. Raynor, 22 NY2d 417 (1968); Matter of Perrotta v. City, 107 AD2d 320 (1st Dept.), aff'd on opn below, 66 NY2d 859 (1986); Lefrak Forest Hills Corp. v. Galvin, 40 AD2d 211 (2nd Dept., 1972), aff'd, 32 NY2d 796 (1973), cert denied, 414 US 1004 (1973). In order to obtain vested rights it is necessary that the owner have undertaken actual construction of a substantial nature. Syracuse Aggregate Corp. v. Weise, 51 NY2d 278 (1980). This construction must effect a tangible change in the property and

---

[5] Appellant raised below the argument that the City was equitably estopped from revoking the permit but was unable to show any wrongdoing by the City.

cannot be of a mere preliminary nature. Rathkopf, The Law of Zoning and Planning, Fourth Edition (1965), Vol, 4, c. 57, p, 57-10; Cooper v. Dubow, 41 AD2d 843, 844 (2nd Dept.), app. den'd, 33 NY2d 518 (1973).

Most of appellant's claimed expenses - architectural and engineering fees, legal expenses, and bank fee for the construction loan - are clearly preliminary and do not give rise to vested rights. The only specific expense involving actual construction, the $63,500 for the new heating plant, must be disallowed.[6] Only

---

[6] The other, unspecified $150,000 which appellant alleges was paid to the general contractor, cannot be considered in the vested rights analysis as the record does not indicate what this money was used for. Also, the contractual obligations incurred by appellant, where no money actually changed hands, do not establish "actual construction". See Gramaton Hills Manor, (Footnote Continued)

construction which cannot be used for other purposes can be considered in a vested rights analysis. Matter of Golden City Park Corp. v. Board of Standards and Appeals of the City of New York, 263 App. Div. 52 (2nd Dept., 1941), aff'd, 289 N.Y. 720 (1942). See also Matter of Andgar Associates v. Board of Zoning Appeals of Incorporated Village of Port Washington North, 30 AD2d 672 (2nd Dept.), app. den'd, 22 NY2d 648 (1968). Even assuming, arguendo, that the installation of the heating system is not disallowed by this rule, the $63,500 is not sufficiently substantial in relation to the estimated total renovation cost of five million dollars to give rise to vested rights. Town of Lloyd v. Kart Wheelers

---

(Footnote Continued)
Inc. v. Manganiello, 30 Misc2d 117 (sup ct., Westchester Co., 1961); Rathkopf, supra, at p. 57-10.

Raceway, Inc., 28 AD2d 1015 (3rd Dept., 1967); Reichenbach v. Windward at Southhampton 80 Misc.2d 1031, 1035 (Sup. Ct., Suffolk Co.), aff'd on opinion below, 48 AD2d 909 (2nd Dept., 1975).

In diminishing the profits that appellant expected to earn when it purchased the subject premises, the Zoning Amendments did not effect a taking of appellant's property in violation of the due process clause. As this Court stated in Penn Cental Transportation Co. v. New York City, supra, 438 U.S. at 130:

> The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.

Appellant's strategy is transparent. Appellant had notice of the impending zoning change from the very start, but simply shut its eyes to the law, and proceeded with the

eviction of tenants and conversion of the premises, hoping to circumvent the application of the Amendments by the acquisition of vested property rights. Appellant's cry that it was "shook down" (juris. st., p.6) by the lawful application of the Zoning Amendments is unworthy of reply. As demonstrated, the Zoning Amendments are a valid expression of the legislative goal of protecting and encouraging commercial activity in lower Manhattan. Quite simply, appellant has demonstrated no constitutional infirmity in the application of this legislation to it, and no substantial question necessitating review by the Supreme Court of the United States.

The "grandfather" provisions of the Zoning Amendment do not violate the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

Two classes of owners are "grandfathered" under the zoning resolution, and exempted from the conversion contribution requirement. The exceptions are as follows:

> **§15-013**
> **A. Building Permits**
> If, before April 9, 1981, a building permit was lawfully issued for an alteration based upon plans filed and pending with the Department of Buildings on or before September 1, 1980, construction pursuant to such permit may be continued, at the option of the owner, without regard to the other provisions of this chapter.
>
> * * *
>
> **B. Variances**
> If, before April 9, 1981, a variance was granted by the Board of Standards and Appeals to permit the conversion of a building or portion thereof, to residential or joint living work quarters for artists use, which variance has not

> lapsed pursuant to the provision of Section 72-23, and a building permit was issued in accordance with the terms of said variance, construction pursuant to such permit may be continued without regard to the other provisions of this Chapter.

It is well-settled that classifications in statutory schemes will be upheld if they further a legitimate state objective and do not burden fundamental rights. In Vance v. Bradley, 440 U.S. 93, 97 (1979), this Court stated:

> We will not overturn a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

See also Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (classification in land use scheme held permissible); City of New Orleans v. Dukes, 427 U.S. 297 (1976) ("grandfather" provisions in licensing statute upheld). In Rogin v. Bensalem Township, supra, 616 F2d at 687, the Court of

Appeals for the Third Circuit specifically held that a zoning scheme which classified developers by the date they applied for permits did not contravene the equal protection clause of the fourteenth amendment.

It is manifest that the distinctions created by the Zoning Amendments are founded on valid reasons and further the objective of the statute as a whole. With respect to the exception in §15-013(A) for owners who applied for a permit before September 1, 1980, the crucial difference between an owner who applied for a permit prior to September 1, 1980 and an owner who, like appellant, applied after September 1, 1980, is that the former had no notice of the proposed zoning change. Thus, this provision is designed to protect owners who applied for their permits before the public announcement of the City's proposed loft

conversion policy on September 2, 1980. A failure to limit the benefits of §15-013(A) to those owners applying for conversion permits prior to September 2, 1980 would have given owners who learned of the impending legislation after September 1, 1980 an incentive to apply immediately for permits and hastily empty their buildings of the very job-producing tenants which the Amendments are designed to protect, in order to avoid paying relocation benefits upon passage of the Amendments.

The distinction in §15-013(B), limited to owners who obtained a variance and permit prior to enactment of the amendments, is equally reasonable. The grant of a variance represents a finding by the Board of Standards and Appeals that strict enforcement of the zoning resolution would impose a substantial economic hardship on the applicant and prevent the realization

of a reasonable return on the property. Thus §15-013(B) protects owners who have previously obtained relief from hardship from having the property once again rendered unprofitable, necessitating a duplicative, time consuming and expensive second variance application. These considerations have no relevance to an owner, such as appellant, about whom the BSA has never made a determination of hardship.

Where the grandfather provisions rationally further the legitimate objectives of the zoning scheme, it is manifest that appellant's equal protection challenge, like its other arguments, does not present a substantial constitutional question warranting review by this Court.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

DORON GOPSTEIN
Acting Corporation Counsel of
the City of New York
Attorney for Appellee

LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,
DANA MARTINE ROBBINS,

of Counsel.